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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERICK ANTONIO RODRIGUEZ, Defendant and Appellant.	B199020 (Los Angeles County Super. Ct. No. LA047377)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard H. Kirschner, Judge. Modified and, as so modified, affirmed.

I. Mark Bledstein for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Erick Antonio Rodriguez appeals from the judgment entered following a jury trial that resulted in his convictions for second degree murder, two counts of attempted murder, two counts of assault with a firearm, and shooting at an occupied motor vehicle. Rodriguez was sentenced to a prison term of 81 years to life.

Rodriguez contends the trial court committed instructional error. The People contend the abstract of judgment fails to reflect the court security fee which was imposed by the trial court at sentencing. We modify the judgment as requested by the People. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

On October 23, 2004, at approximately 3:30 a.m., Tae Joon ("Andy") Kim, Jeremy Mimran, and Ryan Barton drove in Kim's Nissan Frontier truck to the "Frisky Kitty," a strip club located in Reseda. Upon learning that there was a cover charge and the club was closing within a half hour, the men decided not to enter the club.

While standing near the entrance, Kim had a brief conversation with Rodriguez, who was standing with two other men. Neither Kim nor Rodriguez appeared angry, and there was no physical contact between the two. Barton thought he recognized Rodriguez as a fellow Reseda High School alumnus, and asked Rodriguez if he had attended high school there. Rodriguez stated he had not, and the discussion ended. Barton had no physical contact with Rodriguez. Kim, Barton, and Mimran returned to Kim's truck and departed the club parking lot, with Kim driving, Mimran in the front passenger seat, and Barton in the back. After their vehicle had traveled approximately one and one-half blocks, Rodriguez, driving his Chevrolet Tahoe sport utility vehicle, sped to catch up with Kim's truck. A man who had been outside the Frisky Kitty was in the front passenger seat with him. Rodriguez pulled alongside the Frontier on the passenger side, and waved and pointed a gun at the occupants. He appeared to be angry and was yelling at the occupants of the Frontier. Mimran's hand was up on the side of the truck, and he thought Rodriguez was telling him to put his hand down. He did so, and Rodriguez fired seven or eight shots at the Frontier. Both Barton and Mimran ducked. The rear

passenger window of the truck shattered, and Barton heard bullets passing around him. Kim slumped onto the steering wheel and the Frontier crashed into a tree. Barton and Mimran had no significant injuries, but Kim had suffered a fatal gunshot wound to the head.

Police recovered six shell casings where the shooting occurred. In addition to a bullet recovered from Kim's brain, two bullets were recovered from the passenger side of the Frontier. The Frontier bore four or five bullet holes.

Police located Rodriguez using information obtained from Frisky Kitty employees and surveillance tapes. During an audiotaped interview with detectives, Rodriguez admitted committing the shooting. He explained the incident as follows. On the night of the shooting, he had consumed five or six beers and was "buzzed." While outside the Frisky Kitty, Barton hit him in the chest, grabbed his nipple, and stated, " 'I know you.' " Rodriguez told Barton he did not know him. Barton stated that they had gone to grade school together, and said, " 'I fucking know you.' " Rodriguez stated, " 'Alright,' " shook Barton's hand, and walked away. As Barton and his companions drove from the parking lot, Barton tried to hit Rodriguez through an open back window. Rodriguez and his friend followed Kim's vehicle in Rodriguez's Tahoe. Barton was laughing and " 'talking shit' " to Rodriguez through the truck's window. Rodriguez motioned to the truck's occupants to lower their windows so he could determine what "the guy's problem" was. Barton continued to "talk shit" and all the truck's occupants laughed. Rodriguez fired his gun at the truck and drove off. He was not trying to hit anyone, but only intended to scare the truck's occupants. He did not know that the shots hit anyone and did not know the truck had crashed after the shooting. Rodriguez, who is right-handed, fired with his left hand because his right hand was in a splint.

Rodriguez gave police the name of a friend to whom he had given the gun used in the shooting. Police retrieved a Colt semiautomatic .32-caliber pistol from the friend. Ballistics tests revealed that the bullets recovered from Kim's body and the Frontier were fired from the gun, as were the shell casings found at the scene.

2. *Procedure.*

Trial was by jury. Rodriguez was convicted of the second degree murder of Kim (Pen. Code, § 187, subd. (a)),[1] the attempted murders of Mimran and Barton (§§ 664, 187, subd. (a)), assault with a firearm on Mimran and Barton (§§ 664, 245, subd. (a)(2)), and shooting at an occupied motor vehicle (§ 246). The jury found true the special circumstance allegation that the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle. It also found Rodriguez personally and intentionally used and discharged a firearm, causing Kim's death (§ 12022.53, subds. (b), (c), (d)); Rodriguez intentionally inflicted great bodily injury and death on Kim as a result of discharging a firearm from a motor vehicle (§§ 12022.55); and Rodriguez personally and intentionally used and discharged a firearm in the assaults and attempted murders (§§ 12022.53, subds. (b), (c), 12022.5). The trial court sentenced Rodriguez to a term of 81 years to life in prison. It ordered Rodriguez to pay victim restitution, and imposed a restitution fine, a suspended parole restitution fine, and a court security assessment. Rodriguez appeals.

DISCUSSION

1. *The trial court did not err by failing to sua sponte instruct the jury on an alternative theory of involuntary manslaughter.*

a. *Additional facts.*

The trial court instructed the jury with standard instructions on first and second degree murder, voluntary manslaughter, involuntary manslaughter, and related principles. The involuntary manslaughter instruction, CALJIC No. 8.45, stated in pertinent part: "Every person who unlawfully kills a human being, without malice aforethought, and without an intent to kill, and without conscious disregard for human life, is guilty of the crime of involuntary manslaughter in violation of Penal Code section 192, subdivision (b). [¶] A killing in conscious disregard for human life occurs when a killing results from an intentional act, the natural consequences of which are dangerous to life, which

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[1] All further undesignated statutory references are to the Penal Code.

act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life. [¶] The commission of an unlawful act, without due caution and circumspection, would necessarily be an act that was dangerous to human life in its commission. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; and [¶] 2. The killing was unlawful."

b. *Discussion.*

Rodriguez contends that his conduct "amounted to no more than involuntary manslaughter." Although the jury was, in fact, instructed on involuntary manslaughter, Rodriguez contends the trial court prejudicially erred by failing to sua sponte instruct that involuntary manslaughter can also be based on a death occurring during the commission of the purportedly noninherently dangerous felony of assault with a deadly weapon. We disagree.

A trial court must sua sponte instruct the jury on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Zamudio* (2008) 43 Cal.4th 327, 370; *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Instructions on a lesser included offense must be given when there is substantial evidence from which the jury could conclude the defendant is guilty of the lesser offense, but not the charged offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Breverman, supra,* at p. 162; *People v. Garcia* (2008) 162 Cal.App.4th 18, 24-25.) Substantial evidence is evidence that a reasonable jury could find persuasive in determining the lesser offense, but not the greater, was committed. (*People v. Manriquez, supra,* at p. 584; *People v. Benavides* (2005) 35 Cal.4th 69, 102; *People v. Garcia, supra,* at pp. 24-25.) In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the jury. (*People v. Manriquez, supra,* at p. 585.) The duty to instruct sua sponte on lesser included offenses is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence. (*People v. Lee*

(1999) 20 Cal.4th 47, 61.) We employ a de novo standard of review when determining whether a lesser included offense instruction should have been given. (*People v. Manriquez, supra,* at p. 584; *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

The trial court properly did not instruct on involuntary manslaughter based on commission of a noninherently dangerous felony, because there was no substantial evidence supporting such an instruction. Murder is an unlawful killing committed with malice aforethought. (§ 187; *People v. Garcia, supra,* 162 Cal.App.4th at p. 26.) Express malice is an unlawful intent to kill. (*People v. Garcia, supra,* at p. 26.) Malice is implied when a killing is proximately caused by an act, the natural consequences of which are dangerous to life, deliberately performed by a person who knows his conduct endangers the life of another, and who acts with conscious disregard for life. (*Id.* at p. 27.)

Manslaughter is a lesser included offense of murder, and does not include the element of malice. A defendant is guilty of voluntary manslaughter if he or she commits an intentional and unlawful killing but lacks malice. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 27.) A defendant commits involuntary manslaughter when the killing occurs (1) in the commission of an unlawful act, not amounting to felony, i.e., a misdemeanor; or (2) in the commission of a lawful act which might produce death, performed in an unlawful manner, or without due caution and circumspection. (§ 192, subd. (b); *People v. Cook, supra*, 39 Cal.4th at p. 596; *People v. Abilez, supra*, 41 Cal.4th at pp. 515-516; *People v. Garcia, supra,* at p. 27; *People v. Parras* (2007) 152 Cal.App.4th 219, 227.) The former type of involuntary manslaughter requires that the defendant acted with general criminal intent and that the predicate misdemeanor was dangerous to human life under the circumstances. (*People v. Garcia, supra,* at p. 27.) The latter type requires proof of criminal negligence, i.e., aggravated, culpable, gross, or reckless conduct that creates a high risk of death or great bodily injury and evinces a disregard for human life or for the consequences of the conduct. (*Ibid.*) Additionally, an *unintentional* homicide committed in the course of a *noninherently dangerous* felony may properly support a conviction of involuntary manslaughter, if the felony is

committed without due caution and circumspection. (*People v. Burroughs* (1984) 35 Cal.3d 824, 835-836, disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; *People v. Garcia, supra,* at p. 29; *People v. Huynh* (2002) 99 Cal.App.4th 662, 679; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556.) However, an unintentional killing, without malice, committed during the commission of an *inherently dangerous* felony does not constitute involuntary manslaughter. (*People v. Garcia, supra,* at p. 31.)

An inherently dangerous felony is one which, by its very nature, cannot be committed without creating a substantial risk that someone will be killed, or carries a high probability that death will result. (*People v. Robertson* (2004) 34 Cal.4th 156, 166-167; *People v. Garcia, supra,* 162 Cal.App.4th at p. 28, fn. 4.) A high probability does not mean a greater than 50 percent chance; death need not result in a majority, or even in a great percentage, of instances. (*People v. Robertson, supra,* at p. 167; *People v. Clem* (2000) 78 Cal.App.4th 346, 349.) In determining whether a felony is inherently dangerous to human life, we consider the elements of the offense in the abstract, not the defendant's specific conduct. (*People v. Garcia, supra,* at p. 28, fn. 4.)

Contrary to Rodriguez's argument, both assault with a firearm and shooting at an occupied motor vehicle are inherently dangerous felonies. (*People v. Garcia, supra*, 162 Cal.App.4th at p. 28, fn. 4; *People v. Tabios* (1998) 67 Cal.App.4th 1, 10-11.) Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; *People v. Licas* (2007) 41 Cal.4th 362, 366.) The elements of assault are that the defendant (1) willfully committed an act which by its nature would probably and directly result in the application of physical force on another person; (2) the defendant was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result physical force would be applied to another person; and (3) at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. (*People v. Miller* (2008) 164 Cal.App.4th 653, 662-663.) Assault with a firearm requires (1) proof the defendant committed an assault by means of a firearm, (2) the foreseeable consequence

of which was the infliction of great bodily injury upon the subject of the assault. (*People v. Cook* (2001) 91 Cal.App.4th 910, 920.) In the abstract, assault with a firearm requires commission of an act, with a firearm, likely to result in the application of physical force, with the foreseeable consequence of great bodily injury. Using a firearm in such a way as to forseeably cause great bodily injury necessarily carries a high probability or substantial risk of death. Thus, assault with a firearm is an inherently dangerous felony. (*People v. Garcia, supra,* at p. 28, fn. 4.) Likewise, shooting at an occupied motor vehicle is an inherently dangerous felony because it involves "a clear danger to human life," even if shots are fired only at portions of the car that present no risk to the vehicle's occupants. (*People v. Tabios, supra,* at p. 10.)[2] In the instant case, there was no evidence Rodriguez committed some other, lesser crime that did not amount to an inherently dangerous felony. Instruction that Rodriguez could be convicted of involuntary manslaughter on the basis of his commission of a noninherently dangerous felony was therefore unsupported by the evidence, and was properly omitted.

People v. Garcia, supra, 162 Cal.App.4th 18, is on point. There, the defendant struck the victim in the face with the butt of a shotgun, causing the victim to fall, hit his head on the sidewalk, and die. In a thorough analysis, the court concluded that "[b]ecause an assault with a deadly weapon or with a firearm is inherently dangerous, the trial court properly concluded the evidence would not support Garcia's conviction for

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[2] Rodriguez asserts that the "merger rule precludes a finding of second degree felony murder based upon the jury's finding of shooting at an occupied motor vehicle." The merger doctrine was stated in *People v. Ireland* (1969) 70 Cal.2d 522, 538-540. *Ireland* held that "the felony-murder rule could not be applied when the only underlying or predicate felony the defendant committed was assault, because the assault is an integral part of the homicide. To hold otherwise would relieve the prosecution in most homicide cases of the need to prove malice, as most homicide cases involve assault. [Citation.] . . . Thus, the felony of assault 'merged' into the resulting homicide." (*People v. Sanders* (2003) 111 Cal.App.4th 1371, 1374; see also *People v. Hansen* (1994) 9 Cal.4th 300, 311-312.) However, Rodriguez was not tried on a felony murder theory and his jury was not instructed on felony murder. Thus, the *Ireland* merger doctrine has no application here.

involuntary manslaughter and, therefore, did not err in declining to instruct the jury on involuntary manslaughter as a lesser included offense of murder." (*Id.* at p. 22.) The same is true here.

Even if the trial court had erred by omitting the instruction – a contention we reject – any error would have been harmless. The jury was given the option of convicting Rodriguez of involuntary manslaughter, but declined to do so. Instead, the jury *expressly* found Rodriguez had the intent to kill in its verdict on the special circumstance allegation ("We further find that the Special Circumstance pursuant to Penal Code Section 190.2(a)(21) that the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person and persons outside the vehicle with the intent to inflict death to be: true"). Further, in finding Rodriguez guilty of the attempted murders of Mimran and Barton, the jury necessarily found he had the specific intent to kill. It is well established that error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions. (*People v. Lancaster* (2007) 41 Cal.4th 50, 85; *People v. Elliot* (2005) 37 Cal.4th 453, 475; *People v. Lewis* (2001) 25 Cal.4th 610, 646.) Here, the jury found Rodriguez had the intent to kill, and therefore rejected the theory on which his argument for the additional involuntary manslaughter instruction rests.

Finally, given the evidence, it is not reasonably probable the jury would have convicted Rodriguez of involuntary manslaughter even had the instruction been given. The failure to instruct sua sponte on a lesser included offense is, at most, an error of California law alone, and reversal is required only if it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Breverman, supra,* 19 Cal.4th at p. 165; *People v. Beames* (2007) 40 Cal.4th 907, 929; *People v. Watson* (1956) 46 Cal.2d 818, 836.)[3] Even if the jury had credited

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[3] Rodriguez argues that the erroneous failure to instruct on a lesser included offense must be reviewed under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S.

the evidence that Rodriguez did not *intend* to kill anyone – a conclusion belied by its verdicts – and that his aim was merely inaccurate because he was firing with his left hand due to his finger injury, the evidence that Rodriguez acted with malice was overwhelming. A defendant may be found guilty of second degree murder if he lacks the intent to kill, but acts with implied malice. (*People v. Knoller* (2007) 41 Cal.4th 139, 155; *People v. Rogers* (2006) 39 Cal.4th 826, 873.) " 'Malice is implied when the killing is proximately caused by " 'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " ' [Citations.]" (*People v. Garcia*, *supra*, 162 Cal.App.4th at p. 27.) The evidence was undisputed that Rodriguez deliberately fired seven shots at a truck occupied by three persons, from close range. Any reasonable juror would conclude this conduct was highly dangerous to human life. Likewise, it is inconceivable that reasonable jurors would believe Rodriguez was ignorant of the danger posed by his actions. Rodriguez knew the vehicle was occupied and intended to scare the victims. It is common knowledge that shooting at persons from close range is one of the most dangerous activities imaginable. On this record, there is no possibility the jury would have convicted Rodriguez of involuntary manslaughter had the instruction at issue been given.[4]

18.) He is incorrect. Our Supreme Court has repeatedly held that the *Watson* harmless error test applies. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1267.)

[4] Given our conclusion that the instruction Rodriguez contends should have been given was improper, and that no prejudice ensued from its omission in any event, we do not reach the People's argument that Rodriguez's claim was forfeited by his failure to request clarification or amplification of the instructions given.

2. *Correction of the abstract of judgment.*

At sentencing, the trial court orally imposed a $20 court security assessment. The abstract of judgment, however, fails to reflect the assessment. The People correctly point out that the abstract of judgment should be amended to comport with the trial court's oral pronouncement of judgment. The record of the oral pronouncement of the court controls over the abstract of judgment; any discrepancy between the two is presumed to be the result of clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Accordingly, we order this clerical error corrected. (*People v. Mitchell, supra*, at p. 185.)

DISPOSITION

The abstract of judgment is ordered modified to reflect a court security assessment of $20. The Clerk of the Superior Court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.